

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-184402

DATE: December 22, 1975

MATTER OF: Houston Films, Inc.

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## DIGEST:

1. Where record shows that evaluation of proposals was in accordance with established evaluation criteria and was based on reasoned judgment of evaluators, protest based upon offeror's disagreement with evaluation is denied since determination of relative merits of proposals is responsibility of contracting agency which will not be disturbed unless shown to be arbitrary or contrary to statute or regulations.
2. Agency is not required to ignore relative advantage offered by one firm in particular evaluation area merely because firm's advantageous position resulted from previous contract awards, since Government awards contracts on basis of most advantageous offer and is not required to equalize competition by taking into consideration competitive advantages accruing to firms by reason of their own circumstances.
3. Although protester claims it was misled during oral discussions which adversely impacted on its proposed costs, and it does appear that protester misunderstood purpose of hypothetical problem posed by source selection personnel during negotiations, protester was not prejudiced thereby since relative standing of offerors with respect to proposed cost was not affected and therefore misunderstanding cannot be regarded as affecting source selection decision.
4. Source Selection Official's decision not to consider RFP-required cost estimates for phase-in period in determining cost to the Government of competing proposals in order to eliminate competitive advantage of incumbent was not contrary to provisions of RFP.
5. Claim that contracting agency did not consider moral integrity of offeror selected for award is refuted by record, which shows that actions complained of were considered in evaluation of past performance and which provides no basis for conclusion that agency acted unreasonably in rating selectee's past performance as excellent.

6. Contention that certain evaluation factors should have been weighted more heavily is without merit, since agency determination of weight to be given specific evaluation criteria is not subject to question by this Office in absence of clear showing that agency action was arbitrary or not supported by facts and no such showing has been made.
7. Protest against agency's refusal to point out weaknesses and deficiencies in proposal during discussions is not subject to objection where such refusal based on agency procurement directive which was read to protester at commencement of oral discussion session and where agency repeatedly requested clarification or amplification with respect to areas in proposal about which it had concern.
8. Objections to various solicitation provisions are untimely filed where not raised prior to closing date for receipt of proposals and will not be considered on merits.

Houston Films, Incorporated (HFI) has protested the selection of A-V Corporation by the National Aeronautics and Space Administration (NASA) for award of a contract for motion picture production services. HFI alleges that the evaluation of proposals was arbitrary, that it was misled by NASA during oral discussions, that the cost evaluation was not consistent with the provisions of the solicitation, that certain prior actions by A-V bearing on contractor integrity should have militated against selection of A-V for award, and that the procurement reflected favoritism toward A-V on the part of NASA officials. HFI also objects to the weight NASA gave to certain evaluation factors and to NASA's failure to point out weaknesses and deficiencies during negotiations.

Request for proposal (RFP) 9-BB52-55-5-15P was issued January 30, 1975, by NASA's Johnson Space Center (JSC), Houston, Texas, contemplating award of a cost-plus-fixed-fee contract for motion picture production work, including script-to-screen motion picture productions and news release film clips covering

significant events in research and development programs, training programs, and project activities at JSC, as well as related editorial research, narration, special effects, and animation camera and art work.

Proposals were to be evaluated by a Source Evaluation Board (SEB) which was to report its findings to a Source Selection Official (SSO) whose function it was to select the eventual contractor.

The RFP set forth three principal categories of evaluation factors: mission suitability factors, cost factors, and "other" factors. Only mission suitability factors were to be weighted and scored. Costs were to be evaluated by the SEB for adequacy and realism; the RFP did not specify how "other" factors, which included such things as past experience and "phase in" plan, were to be evaluated.

Although the RFP did not explicitly set forth the relative weights of the three categories, it cautioned offerors "not to minimize the importance of adequate response in any area" since "cost or other factors \* \* \*, although not weighted, could be the determining factors in source selection."

Within the mission suitability category, factors were set out in descending order of importance as follows:

- (1) Technical Understanding - most important
- (2) Key Personnel - very important
- (3) Management and Operating Plans - important
- (4) Corporate Resources - least important

On March 17, 1975, proposals were received from three firms: A-V (the incumbent contractor), HFI, and H. G. Peters and Company. All three proposals were determined to be within a competitive range and oral discussions were conducted with each during the period of April 15 through April 16, 1975, during which the SEB provided each offeror with the opportunity to clarify, substantiate or confirm the contents of its proposal. Best and final offers were received on April 28, 1975, and were assigned a final ranking based on all evaluation data. The rankings are explained by the SSO as follows:

"A-V Corporation (A-V), the incumbent contractor, received the highest score and had an overall rating of excellent in Mission Suitability, as well as excellent in each of the four

individual evaluation criteria. In the Technical Understanding criterion, its proposal demonstrated excellent understanding of all facets of motion-picture production and other motion-picture services required by the Statement of Work. Its film example was rated excellent. In the area of Key Personnel, the Project Manager had strong qualifications in all pertinent areas, including four years as the incumbent in that position. Both individuals proposed under Writer/Producers had excellent experience and backgrounds. The proposed Management Plan, rated excellent, was very complete and reflected a clear understanding of the total job. The Operation Plan was thorough and clear and was rated excellent, as was the proposed Organization and Staffing. Under Corporate Resources, rated excellent, personnel and equipment, required backup facilities, and complete animation and film processing capabilities are all available.

"H. G. Peters and Company (HGP) had the next highest score \* \* \*.

\* \* \* \* \*

"Houston Films, Inc. (HFI) ranked third in Mission Suitability and was rated good. Its proposal was rated excellent in Understanding of Complexities and Approaches for Solutions, and indicated a thorough understanding of motion-picture production. The film example was rated good. Under Key Personnel, the Project Manager was rated fair, primarily because of limited fully pertinent experience, and in Writer/Producers HFI was rated excellent. HFI was rated fair in Management Plan where the Board found weaknesses in the total project management effort. The Operating Plan was rated good. It appeared that the total organization was overly structured for the size of the effort, and Organization and Staffing received a rating of fair. HFI was rated poor in Corporate Resources; the proposal indicated little corporate backup capability in personnel, equipment, or facilities, and contained questionable capability and available resources for processing and animation.

"As indicated above, the Board evaluated cost and other factors, but did not score either. As directed by NASA regulation, the Board estimated the approximate impact on cost that would result from the elimination of correctable weaknesses for each proposal in the competitive range, and made appropriate corresponding adjustments to the proposed costs and fees. These adjusted totals represent the probable cost of the respective proposals, and it should be noted that the Board expressed a high degree of confidence in each probable cost figure. Of the three proposals, the probable cost of the A-V proposal was lowest for the first year as well as for the projected three years. The probable cost figures for HGP and HFI were close to each other and both were higher than that of A-V.

"With respect to the Other Factors, all three proposals received the same rating except in the areas of Company Experience where A-V and HGP were rated excellent and HFI was rated poor, and Phasein Plan where HGP was rated good and HFI was rated fair."

After reviewing the SEB's presentation and consulting with a small group of personnel who heard the presentation and who carried responsibilities related to the procurement, the SSO concluded that the selection of the first-ranked offeror for award would be most advantageous to the Government.

We will first consider HFI's allegations concerning the evaluation of proposals. The SEB found defects or weaknesses in HFI's proposal in the sample motion-picture print submitted and in the areas of key personnel, "phasein" plan, management and operating plans, and corporate resources. HFI takes exception to all of these findings and claims that its rating in each area should have been higher than that given by SEB.

HFI's objections to the evaluation of its sample motion picture, which the RFP required for evaluation under the "Technical Understanding" factor, primarily concern the SEB's finding of an editor's grease pencil marks printed into the film and a splice in the middle of a frame. HFI argues that a "sister" print in its possession

reveals no such defects, only some laboratory processing watermarks on a few frames which HFI states were beyond its control. HFI contends that the SEB's findings reflect the Board's technical incompetence since it is impossible to splice a film in mid-frame (allegedly because the sprocket holes will fit into an editing device that will perform splices only on the frame edges of the film and never in the middle of a frame) and since an editor never uses a grease pencil on the original rolls, from which the film print was made. HFI has submitted a letter from an independent film laboratory stating that it has examined the original rolls used in the print and there are neither grease pencil marks nor any mid-frame splice at the places indicated by SEB.

The record indicates that NASA did find marks on the film print submitted by HFI which NASA considers to have the strong appearance of an "x" made by a pencil or marker and which, in NASA's opinion, are not random laboratory processing watermarks. The "splice" in the film print is reported to be a clean cut across the middle of the frame but not across the sound track, with an apparent cement overflow. Although the SEB acknowledges that it is not standard procedure to splice a film in mid-frame, it states that it is possible to splice a film anywhere and the mid-frame cut has the "definite appearance of a splice."

Other aspects of the film over which NASA and the protester disagree involve the depth and spacing of the narration early in the film, the placement of several scenes with respect to narration, and underlighting in several scenes. The SEB expressed concern over these areas, although it recognized that the spacing of the narration was due "in part" to the wishes of the client for whom the film had been made. HFI does not agree that these can be regarded as defects, and contends that the SEB lacked knowledge of the conditions of production, such as midnight cinematography, and the requirements imposed by the film's sponsor.

(HFI also contends that the SEB ignored, in evaluating its proposal, the most important element of the film-making process: creativity. As evidence of its creativity, the protester refers to numerous national and international awards received by its personnel. NASA, however, points out that the awards of HFI personnel were not ignored, but were appropriately considered under the evaluation criterion entitled "Key Personnel.")

HFI also objects to the rating of "fair" given to its phasein plan. HFI explains that it offered a minimum phasein plan in order to keep its cost element as low as possible and that it was able to offer a relatively short (2 weeks) phasein period because of the 10 years of experience accumulated by its personnel while employed by A-V. In this regard, HFI asserts that the existing procedures and systems currently in effect at the JSC site of the incumbent, A-V, were largely devised, installed and implemented by personnel of HFI during the period of their employment with A-V.

In explaining the rating given HFI on its phase-in plan, the contracting officer reports:

"The 'fair' rating received by HFI would have been higher except for such weaknesses as the short timeframe (2 weeks) proposed for phasein, the proposed use of personnel not considered necessary to phasein as, for example, the Expediter/Grip, and the absence of a schedule for the accomplishment of significant milestones during phasein. I understand HFI's reference to 'company-peculiar qualifications' to mean that HFI personnel were formerly long-term employees of the incumbent contractor at JSC, and consequently, have a familiarity with work requirements that is peculiar to HFI. If that is the correct meaning of the terms, then HFI's 'company-peculiar qualifications' are limited to operational matters and do not extend to management and administrative areas. This was reflected in HFI's phasein plan which emphasized operational matters and did not give appropriate emphasis and detail to significant administrative tasks that are basic to a smooth contractor changeover \* \* \*"

In the area of Key Personnel, HFI was rated good while A-V was rated excellent. HFI's proposal did not receive an excellent in this area because the SEB rated HFI's proposed project manager as "fair". HFI takes exception to the SEB's citation of a lack of recent supervisory or management experience as a basis for this rating. HFI contends that the SEB failed to consider that for 14 of the last 16 years, the proposed project manager was entrusted with many relevant supervisory duties in his capacity as a producer of motion-pictures for two firms (including 10 years with A-V producing NASA motion-pictures).

In this regard, the contracting officer states:

"HFI is correct in its conclusion that its proposed Writer/Producers and other key personnel were rated 'excellent' by the SEB. However, the proposed Project Manager was rated 'fair.' HFI cites 14 years of writer/producer experience and 2 years as President of HFI as applicable experience for this Project Management position. Obviously, the SEB was evaluating each key position on relatedness of experience to that particular position. Writer/producer experience is appropriate related experience for a writer/producer position. Writer/producer experience also provides appropriate technical and operational background experience for the Project Manager position, but such experience is greatly limited when compared to a Project Manager's total role. The 'supervisory' responsibilities of a writer/producer are considered to be more a matter of coordinating the efforts of various required skills to accomplish a task. Experience cited as President of HFI also has limited relatedness to the duties of Project Manager, due to the nature of the company and the quantity, nature, and size of jobs undertaken. The company is a small, growing one composed of about five or six multiskilled personnel, all of whom are officers in the company \* \* \*. There is little in the way of management in the sense of scheduling and coordination of numerous simultaneous tasks; reporting; hiring, firing, and counseling of employees; handling cost accounting matters, interfacing with various technical and administrative personnel and numerous federal agencies; and numerous other Project Management tasks. Other experience of the proposed Project Manager was considered by the SEB, but its limited relatedness and/or recency allowed only limited credit.

"As indicated previously, the SEB asked a problem question at the oral discussion to test the proposed Project Manager's knowledge of his role in the performance of requirements



under the proposed contract. HFI's proposed Project Manager did not demonstrate such a knowledge. His replies to various questions posed at oral discussions were superficial and his response to the problem question specifically directed to him was incomplete and inadequate. The SEB's findings regarding HFI's proposed Project Manager were supported by the reference checks with personnel who had previously worked with him."

HFI also takes exception to its rating of "fair" (versus "excellent" for A-V) for the factor "Management and Operating Plans." First, HFI points out that most of the operational plans of A-V were designed and developed through important contributions by HFI personnel previously employed by A-V. Second, HFI alleges that the SEB failed to properly evaluate HFI's innovative proposal to realign the positions of producer and other key craftsmen to improve film production operations and also failed to consider the caliber and experience of its personnel available for the production of 35 mm sound film strips--purportedly a new item in the RFP for this procurement for which A-V has no experience. Third, HFI objects to the SEB findings that HFI's plans were "over structured" and that its controls over subcontractors were "loose."

HFI contends that its proposed effort was precisely in accord with staffing specified by the RFP; that it submitted an organization chart clearly showing the interrelated responsibilities and authorities of each position; that the proposed plan provided for deputies to insure a smooth flow of operations in the event of the absence of prime functionaries; and that qualified personnel were carefully assigned to overcome an immense waste of time currently expended at JSC due to "peak loads" and "slack time." It further contends that subcontractors cannot be closely controlled since by their very nature they are not employees within the daily control of management. Nevertheless, HFI states that its president assumed personal responsibility for overseeing the quality and prices of its proposed subcontractors.

Concerning the foregoing contentions, the contracting officer states the following reasons for HFI's rating:

"With respect to Operating Plans, HFI was rated 'good,' showing a clear understanding of the work requirements and presenting a

good step-by-step approach to accomplishing the tasks. Other detailed operational aspects of the work were clear and considered appropriate by the SEB. However, the use, importance, and distribution of status reports were poorly covered. A question was asked on this subject in oral discussions and received a very general, nonsubstantive response. Also, HFI's proposed plans for accomplishing film processing and animation did not insure timely response to Center requirements.

"The SEB considered HFI's proposed preventive maintenance plan commendable, but the inference that no such plan exists today under the existing contract is incorrect and the degree of improvement, if any, over existing practices is overstated.

"The high value of the other 'innovation' involving the realignment of positions is a judgment of the offeror not shared by the SEB. It is not clear in what way HFI's proposed alignment of key personnel would result in improved film production standards or practices.

"The statement made at the debriefing regarding 'overstructured' related to the organization. A 16-man effort, in the judgment of the SEB, requires a simple and direct organization arrangement. The HFI organization chart identified 14 blocks for the 16 personnel. The organization is also considered top heavy with three supervisors in addition to the Project Manager.

"The plan for fluctuating workloads was also considered weak, in that its effectiveness depends on the workload allowing availability of multiskilled personnel for cross utilization.

"With regard to management controls over subcontractors, HFI states that 'subcontractors are not employees within the daily control of a company's management. If they "goof"--they simply don't get the next job.' However, in the SEB's judgment, agreements can be made that

will provide assurances of priority assignment to certain work and the use of quality control practices in performing work requirements. Contractual arrangements can be made to provide penalties for poor performance and thus assure a degree of subcontractor management attention. Some JSC requirements, such as original flight film, are of a nature that a trial and error method is not acceptable.

"HFI's reference to 35mm sound film strips as a 'new item' is incorrect. It is not a new item but has been performed under the JSC motion picture production contract in the past, though requirements are only occasional. Other areas considered to be deficiencies in HFI's Management and Operating Plans by the SEB are a lack of clarity with regard to the responsibilities and authorities of staff personnel, particularly the Project Manager; the dual role of several proposed staff and operational personnel as corporate officers, poorly described working relationships with the JSC Contracting Officer and technical management personnel; and poorly covered overtime and cost controls."

In the area of Corporate Resources, HFI was rated "poor" primarily because its proposal did not indicate any corporate back-up capability. HFI contends that its current back-up facilities are roughly comparable to those possessed by A-V in 1962 when it was first selected for the JSC motion-picture contract, and that HFI's corporate resources must accordingly be evaluated under such a standard so as to negate the current competitive advantages that inure to A-V as a result of 13 years of consecutive awards. HFI further alleges that the procurement is defective because it was predicated upon a pre-determined minimum resource level not set forth in the RFP.

In response, the contracting officer states the following:

"HFI states that the SEB erred in evaluating HFI 'poor' versus 'excellent' for the successful offeror in the Corporate Resources factor. This statement apparently is based on two deficiencies noted at the debriefing. The

first was that HFI has 'no firm arrangements or commitments for financing its operations.' The second deficiency was that HFI has 'no back-up facilities.'

"As to the first cited deficiency, there appears to be a misunderstanding of what was said at the debriefing. There was an Other Factor entitled, 'Financial Condition and Capability' for which ratings of 'satisfactory' or 'unsatisfactory' were used. HFI's financial condition was considered weak, but was rated 'satisfactory' for this Other Factor. The Mission Suitability Factor entitled, 'Corporate Resources,' included: (1) The offeror's plan for acquisition and use of a local offsite facility; (2) corporate or subcontract resources for film processing and animation; and (3) personnel, facility, and equipment backup.

"HFI's proposal in this area did present an adequate plan for acquisition of a local offsite facility although the use of the facility was not detailed. But, HFI had almost no corporate facilities and made no firm arrangements to provide for the performance of film processing and animation through committed subcontractor resources.

"The second significant deficiency was the lack of real backup in personnel, equipment, and facilities. Again these could have been provided for through firm arrangements with subcontractors. The fact that the first team is versatile does not constitute a backup capability. Personnel backup is needed when the first team is fully occupied and additional priority work requirements develop. Potential new divisions of the company do not provide a definite backup capability until they are in existence. The few items of equipment HFI currently possesses do not provide the needed backup capability in that area. A list of potentially available subcontractors such as the one proposed by HFI provides no assurance

of backup for either personnel, equipment, or facilities. HFI's 'back-up financing capabilities' provides no assurance of personnel, equipment, and facility back-up resources as required by the RFP.

"Also, regarding HFI's comment as to a 'predetermined minimum resource level,' no such thing existed. The requirement of the proposed contract could have been accomplished either with total resources belonging to the offeror or any appropriate combination of the offeror's own resources and subcontractor (one or more) resources. There was no predetermined or favored plan. But there was a need for a definite commitment of whatever resources were proposed to assure their availability as needed to accomplish contract requirements. Each proposal was evaluated on its own merits. HFI's proposal provided for no commitment of subcontractor resources and no assurance of availability when needed."

HFI also objects to the "satisfactory" rating given A-V for its Labor-Management Relations Plan. On this point, HFI alludes to a booklet published by A-V allegedly containing anti-union policies and threats, and a purported strike 2 years ago by most of A-V's employees due to unfair labor practices of the management. HFI relates that the Regional General Counsel and Regional Board of the NLRB in Houston made a finding of unfair labor practices but that such findings were reversed on appeal.

With regard to the foregoing matters, and the ultimate evaluation of A-V as satisfactory under this criterion, the contracting officer reports:

"First, by way of clarification, the Other Factors, Labor - Management Relations Plan, identified on page 21 of the RFP, asked offerors to discuss company policy with respect to use of organized labor and describe plans for promoting and maintaining harmonious labor relations during contract performance. The information

requested related to plans for performance under the proposed contract. The information submitted by the successful offeror in response to this RFP requirement was judged satisfactory by the SEB. There was no known basis for further probing of this matter. The information to which HFI refers is of a past performance nature, and if it were appropriate for consideration in evaluation, would be considered as an element of the Past Performance factor. In reference checks made regarding past performance, no information was developed that would justify a lesser rating than that given by the SEB. Furthermore, the Government maintains a neutral position with respect to union versus nonunion matters, and does not show favoritism to either management or labor or become involved in labor strike situations except to the extent that the performance of one of its contracts is or may potentially be affected. The company booklet to which HFI refers was not known to the SEB or the SSO. There was no requirement in the RFP that such material be submitted. There is no requirement in our contracts that contractors submit or make such information known to the Government. The final NLRB decision concerning the company/union differences found A-V Corporation not to be guilty of unfair labor practices. JSC certainly could take no other position on that point and A-V Corporation's actions throughout the period of labor strife did not adversely impact contract performance."

It is clear from these HFI assertions and NASA's responses that HFI and NASA substantially disagree as to the validity of the SEB's evaluation of proposals. However, it is not our function to evaluate proposals in order to determine which should have been selected for award. TGI Construction Corporation, et al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167; Techplan Corporation, B-180795, September 16, 1974, 74-2 CPD 169; Decision Sciences Corporation, B-182558, March 24, 1975, 75-1 CPD 175. The overall determination of the relative merits of proposals is the responsibility of the contracting agency, since it must bear the major burden for any difficulties incurred by reason of a defective evaluation. Training Corporation of America, B-181539, December 13, 1974, 74-2 CPD 337. Accordingly, we have consistently held that

procuring officials enjoy "a reasonable range of discretion in the evaluation of proposals and in the determination of which offeror or proposal is to be accepted for award," and that such determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations. METIS Corporation, 54 Comp. Gen. 612, 614-5 (1975), 75-1 CPD 44; Riggins & Williamson Machine Company, Inc., 54 Comp. Gen. 783 (1975), 75-1 CPD 168; B-178220, December 10, 1973.

Here, NASA, with considerable specificity, has documented the findings upon which the challenged evaluation ratings are predicated. We have carefully reviewed this record in light of the allegations made by HFI. We see nothing in the record which indicates that the evaluation was improper or unfair or that NASA was arbitrary in evaluating the proposals as it did. Rather, it appears that the SEB evaluated proposals on the basis of the reasoned judgment of its members and in accordance with the established evaluation criteria. The fact that the protester is not in accord with that judgment does not render it invalid. See Honeywell, Inc., B-181170, August 8, 1974, 74-2 CPD 87; B-178220, supra.

Furthermore, with regard to HFI's assertion that it should be evaluated with respect to backup facilities on the basis of NASA's 1962 evaluation of A-V in order to eliminate the competitive advantage accruing to A-V as a result of its incumbency since that time, we point out that negotiated Government contracts are awarded on the basis of the proposal that is most advantageous to the Government, price and other factors considered. See NASA Procurement Regulation Directive (PRD) 70-15 (1972); 50 Comp. Gen. 110 (1970). The fact that it was once advantageous to NASA to accept a proposal from a firm with limited backup facilities does not mean that NASA is precluded subsequently from taking advantage of a proposal from a firm that offers more substantial backup facilities. The situation is no different merely because the firm offering the more substantial facilities was able to acquire them as a result of receiving and performing Government contracts. In this regard, we have recognized that the Government is not required to equalize competition on a particular procurement by taking into consideration competitive advantages accruing to firms by reason of their own particular circumstances. 53 Comp. Gen. 86 (1973); B-175834, December 19, 1972; B-175496, November 10, 1972. Such circumstances may include the award of other contracts. See Piasecki Aircraft Corporation, B-181913, June 27, 1975, 75-1 CPD 391. Accordingly, it is our belief that the conclusions reached by NASA with regard to the merits of the respective proposals in the instant case are not subject to legal objection by this Office.

We will next consider HFI's claim that it was misled during negotiations. The contention is that the SEB imposed an additional specification requirement upon HFI during an April 15, 1975, oral discussion session, which was neither set forth in the RFP nor imposed upon the other offerors, but which impacted upon HFI's price.

The issue involves a question posed to HFI's proposed project manager during the oral discussions, requesting his description of the steps he would take in preparing a 10-minute film clip with a voice track from existing stock footage. NASA reports that the question was a hypothetical one and was also asked of the proposed project managers of A-V and H.G. Peters in order to provide the SEB with a basis for evaluating the knowledge of each proposed project manager and to test each individual's overall proficiency.

HFI personnel apparently misunderstood the SEB's purpose in asking the question, and assumed on the basis of that question and subsequent answers by the SEB to queries posed by HFI, that NASA was requiring contractor production of voice tracks for the prospective films, even though the RFP itself contemplated primarily silent film clips with any narration to be provided by JSC employees at no cost to the contractor. According to HFI, the effect of its assumption (that it was now required to furnish voice tracks) was the inclusion of a cost factor in its best and final offer to absorb the cost of the presumed additional requirement. HFI calculated that the extra costs for each of the RFP-estimated 40 clips per year could amount to \$500 per clip. HFI states that although it determined that it could absorb these extra costs by foregoing the G and A portion of its officer salaries that had been budgeted for "after hours" overhead work, and therefore did not have to increase its price, it was precluded from offering a more favorable best and final price.

It does not appear, however, that HFI was prejudiced by this misunderstanding. We have compared the final proposed costs submitted by HFI and A-V. While these cost proposals must remain confidential pending the ultimate award of a contract, the final proposed cost breakdown for the two firms demonstrates that even if HFI's best and final offer had been reduced by the full \$20,000 estimated for the addition of voice tracks, its proposed cost would still be in excess of A-V's. Thus, we do not believe that HFI's misunderstanding can be regarded as materially affecting NASA's source selection decision.

Another of HFI's contentions is that SEB departed from the literal instructions of the RFP which required the submission of cost proposal summaries for the phase-in period. HFI states that



it was advised that notwithstanding its submission of such a cost proposal, those phase-in costs were not considered by the SEB. HFI contends that since it offered a low-cost phase-in plan, it was damaged by the SEB's failure to evaluate this cost element.

The contracting officer reports that this allegation is apparently based on HFI's understanding of a statement made at the debriefing to the effect that phase-in costs were not an element considered in the selection competition. However, the contracting officer explains that:

"\* \* \* Phasein costs are considered by NASA to be a part of the price the Government has to pay for competing a procurement. Therefore, it has become a practice not to penalize nonincumbent firms by including the cost of phasein in the total cost figure shown to the SSO for comparison with the costs of other offerors who may not have required phasein costs. The RFP requires that phasein costs be proposed. The SEB analyzes these costs and they are shown to the SSO as an item separate from other costs proposed by each offeror. In the selection of the motion picture production contractor, the SSO chose not to consider the cost of phasein as a determinant in his selection. If phasein costs had been added to the total cost, they could have had a negative impact on HFI's position, but in not adding them, HFI was in no way penalized."

We think it is clear from this explanation that the required phase-in costs were considered by NASA, but were not included in the SSO's consideration of the cost to the Government of the competing proposals. Since this approach was not contrary to any provision of the RFP, and since HFI could only have been aided rather than penalized by it, we perceive no basis for objecting to it.

HFI also argues that the SEB and SSO erred in failing to carefully consider the moral integrity of A-V in determining whether that firm may be considered a "responsible" contractor for this procurement. In this connection, HFI refers to the alleged improper use by A-V of government-furnished equipment for private commercial work. In response, the contracting officer states:

"The SEB had no evaluation factor titled 'moral integrity' but there were two areas in which pertinent questions of the integrity of offerors would enter the evaluation process. One is in the making of reference checks regarding Past Performance, an Other Factor. The second is in a routine check, required by JSC policy, by the SEB with the NASA Regional Inspector to determine whether or not his files contain significant information concerning offerors in the competitive range. Some of the SEB members, by the nature of their jobs, were familiar with the allegations made in 1972 that A-V Corporation had misused Government property in its possession. They were also familiar with the investigation and resulting actions. Other personnel with whom reference checks were made also had knowledge of these matters. This knowledge was not ignored. However, the nature and magnitude of the problem, the lack of established corporate knowledge or involvement, and the final resolution of these matters, when viewed in the perspective of long-term continuous excellence of technical management, administrative, and cost performance, was not considered to have sufficient relative significance to lower that firm's rating for Past Performance from 'excellent.' Following the above referenced investigation, the Contracting Officer made a formal determination finding A-V to be a responsible prospective contractor. Further, the NASA Regional Inspector's reply to the SEB's inquiry indicated that his files contained no information that would prevent award of a contract to any company whose proposal was in the competitive range."

In light of this explanation, we cannot say that the SEB acted unreasonably in arriving at the "excellent" rating for A-V's past performance, notwithstanding the allegations concerning A-V's misuse of Government property.

HFI's allegation of favoritism by the contracting agency toward A-V is based on the inclusion of a certain provision in the RFP and on an alleged instance of A-V's presenting a gift to a retiring JSC official. The RFP provision required that costs of

laboratory and animation requirements be broken down into two categories, one for "specialized support" and the balance for subcontracted other costs. HFI contends that no one in the industry except A-V quotes its costs on such a basis. The gift, according to HFI, is merely an example of the "[r]eciprocal stroking" which has developed between NASA and A-V and which resulted in the selection of A-V for award.

Section 20.2(b)(1) of our Bid Protest Procedures, see 40 Fed. Reg. 17979 (1975), requires that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals be filed prior to bid opening or such closing date. HFI did not object to this RFP provision prior to submitting a letter dated June 11, 1975, to the contracting officer, which was well after the closing date for receipt of proposals. Therefore, HFI's objection to the provision is untimely and will not be considered on the merits.

With regard to the gift, the contracting officer states that in the only instance of this type of which he is aware, the incumbent's Project Manager, as an individual and not a representative of the company, gave a low-value novelty gift to a former member of the JSC Audiovisual and Motion Picture Production Office on the occasion of the latter's retirement some months ago. It is reported that the JSC employee in question had no relationship to the SEB whatsoever, and was in no position to influence the source selection.

In any event, the record does not support the allegation that the selection of A-V was the result of favoritism on the part of JSC officials. Such an allegation must be supported by facts which tend to show that a particular source selection resulted from something other than fair and impartial actions on the part of the Government. As stated above, it appears from the record in this case that the selection of A-V was based on an evaluation that was consistent with the evaluation criteria and which resulted from the exercise of reasoned judgment by the evaluators. Accordingly, we are unable to conclude that the selection decision was improper because of the alleged favoritism.

HFI also objects to NASA's evaluation of equal employment opportunity compliance and the labor-management relations plan, which were listed as "other" factors, solely as "satisfactory" or "unsatisfactory." It is HFI's contention that the same standards used to rate mission suitability factors ("excellent", "good", etc.)

should have been used to rate these factors. Only in this way, HFI argues, would these criteria be given sufficient weight to adequately reflect the social policies they represent. Had this been done, HFI claims, its overall evaluation score would have been higher than that of A-V.

The selection of evaluation factors and the relative weights assigned to them "are matters primarily for consideration by the contracting agency, and our Office will not substitute its judgment for that of the agency unless it is clearly and convincingly shown that the agency's actions in establishing and applying such factors and weights are arbitrary, capricious or not reasonably supported by the facts." BDM Services Company, B-180245, May 9, 1974, 74-1 CPD 237; 50 Comp. Gen. 565 (1971). Clearly, no such showing has been made in this case. Furthermore, we note that the evaluation scheme used was consistent with NASA's Source Evaluation Board Manual. Therefore, we find this contention to be without merit.

HFI also objects to the SEB's failure during the course of the oral discussion session of April 15 to identify weaknesses or deficiencies in its proposal. HFI claims that this precluded HFI from upgrading the quality of its best and final offer and was contrary to the "letter and intent of federal procurement regulations which require such discussions to be meaningful."

Negotiations are conducted by NASA pursuant to its Procurement Regulation Directive (PRD) 70-15 (revised) (1972). That directive provides, in pertinent part:

"In cost-reimbursement type contracts and all research and development contracts, the contracting officer shall point out instances in which the meaning of some aspect of a proposal is not clear; and instances in which some aspect of the proposal fails to include substantiation for a proposed approach, solution, or cost estimate.

"However, where the meaning of a proposal is clear, and where the Board has enough information to assess its validity, and the proposal contains a weakness which is inherent in a proposer's management, engineering, or scientific judgment, or it is the result of its own lack of competence or inventiveness in preparing its proposal, the contracting officer shall not point out the weaknesses. \* \* \*

We have recognized that the statutory mandate of 10 U.S.C. 2304(g) for written or oral discussions requires that discussions be "meaningful." 51 Comp. Gen. 621 (1972). We have also recognized that the provisions of NASA PRD 70-15 "represent one approach to meeting the statutory requirement for written and oral discussions" and that they are not contrary per se to the statutory requirement since in many instances the pointing out of weaknesses or deficiencies is not required for discussions to be meaningful. Sperry Rand Corporation (Univac Division), et al., 54 Comp. Gen. 408, 411 (1974), 74-2 CPD 276; Dynalelectron Corporation, et al., 54 Comp. Gen. 562 (1975), 75-1 CPD 17. In the cited cases, our examination of the record indicated that the discussions conducted by NASA pursuant to PRD 70-15 had satisfied the statutory mandate for meaningful discussions.

We think a similar conclusion is warranted here. The record indicates that the quoted segment of PRD 70-15 was read to HFI at the beginning of the April 15, 1975, oral discussion session, and that HFI did not object to the discussion approach outlined in that segment either at that time or at any other time until after the selection decision was announced. The record further indicates that during that discussion session NASA repeatedly asked HFI to clarify or amplify upon various areas in its proposal about which NASA, obviously, had some concern. With regard to one such area, that of the proposed project manager, we note that the NASA discussion approach of asking for clarification or amplification has been sufficient to alert offerors to weaknesses in the area of proposed personnel and has resulted in the submission of revised proposals incorporating changes in the proposed personnel. Programming Methods, GTE Information Systems, Inc., B-181845, December 12, 1974, 74-2 CPD 331. After reviewing the entire record, we are of the belief that under these circumstances the discussions conducted by NASA are not subject to objection.

HFI's remaining contentions concern two RFP provisions which contemplate two 1-year extensions without formal competition and require that offerors include in their cost proposal summaries estimated labor escalation rates for the second and third years of contract performance. As noted previously, allegations based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals [here March 17, 1975] must be filed prior to such date. Since HFI did not raise the objections until after it was notified of the selection decision, they will not be considered.

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For the foregoing reasons, the protest is denied.

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of the United States